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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BARBARA BLUM, as Commissioner of the New York State Department of Social Services; DAVID AXELROD, as Commissioner of the New York State Department of Health,

Petitioners,

against

WILLIAM YARETSKY, RALPH CUEVAS, and THE GRAY PANTHERS, NEW YORK CHAPTER,

Respondents,

and

MARY FOLEY, RAE WOLPER, ROSE SHULMAN, BESSIE ROSSOFF, PAULINE ASHKENAZY, SADIE BIRENZWEIG, MARTHA ZAHL, EDNA KOLMAN, JAMES LUNDY and PHILOMENA LATONA LUNDY, on behalf of themselves and all others similarly situated,

Intervenors-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Should the Court of Appeals have determined the due process rights of nursing home Medicaid patients who are transferred from one level of care to another by their private physician or nursing home or from a lower to a higher level of care on the advice of federally-mandated Utilization Review Committees when no named respondent or identified class member alleged that he had been, or imminently would be, subject to such a transfer?

2. Is the transfer of a patient from one level of care to another, by a private physican or other private party, affected by state action solely because the patient is Medicaid-funded and one result of the transfer is a change in the amount of benefits paid on his behalf?

3. Is a nursing home Medical patient deprived of a protected interest in liberty or property, not shared with privately financed patients, which entitles him to a due process hearing when he is transferred from one level of care to another by his private physician or nursing home?

4. Is a nursing home Medicaid patient deprived of a protected interest in liberty which entitles him to a due process hearing about his transfer to a higher level of care on the advice of a Utilization Review Committee?

Parties in the Court Below

Robert Whalen, M.D., was a party in the court below in his capacity as Commissioner of the New York State Department of Health and individually. Petitioner Axelrod succeeded Dr. Whalen as Commissioner of Health on January 2, 1979, but was not sued individually. Dr. Whalen is not named as a party to this petition because damages were not awarded, and the declaratory and injunctive relief that was granted is not enforceable against him individually. The names of all the other parties in the court below appear in the caption of this petition.

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Opinions Below

The order of the Court of Appeals denying petitioners' request for rehearing is not reported. It is reproduced in Appendix A to this petition at pp. 1a-2a.

The opinion of the Court of Appeals is reported at 629 F.2d 817. It is reproduced in Appendix B to this petition at pp. 3a-18a.

The endorsement and partial final judgment of the district court are not reported. They are reproduced respectively in Appendices C and D to this petition at pp. 19a-21a and p. 22a.†

Other opinions in this case, which do not involve the questions presented in this petition, are reported at 592 F.2d 65 and 456 F. Supp. 653.

Unreported decisions, which do not involve the questions presented in this petition, were filed in the district court on January 10, 1978 and April 8, 1981.

Jurisdiction

This Court has jurisdiction over the questions presented under 28 U.S.C. § 1254(1).

The opinion of the Court of Appeals issued on August 25, 1980, and the order denying petitioners' request for rehearing issued on February 18, 1981.

Statement of the Case

The named respondents and intervenors-respondents are medical assistance ("Medicaid") recipients who are now, or have been, patients in private skilled nursing facilities ("SNFs") or private health-related facilities ("HRFs") in New York.* SNFs offer a higher level of medical care

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† Appendices to this petition are cited hereafter as "App. —, p. —."

*Both SNFs and HRFs are certified and regulated by the New York State Department of Health which also sets the reimbursement rates for the services they provide to Medicaid eligible patients. *See* New York Public Health Law ("NYPHL") Art. 28; 10 New York Code, Rules and Regulations ("NYCRR") Subpart 86-2.

than HRFs, and SNF Medicaid reimbursement rates are generally higher.* Between 1975-1977, Utilization Review Committees ("URCs")** determined that respondents and intervenors-respondents no longer needed the level of care they were receiving and recommended transfers to facilities with lower levels of care, i.e., those who were patients in SNFs were to be transferred to HRFs, and those in HRFs, transferred to private proprietary homes for adults ("PPHAs").*** The URC determinations were affirmed by the Commissioner of the Department of Social Services after administrative fair hearings were con-

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* *See* 42 CFR Subpart k, §§ 440.40 and 440.150. Medicaid reimbursements are paid directly to the nursing home "provider" by the New York State Department of Social Services, the "single state agency" administering the state's Medicaid program. *See* New York Social Services Law ("NYSSL") § 363-a.

** Congress established the utilization review system to ensure that Medicaid patients receive appropriate levels of care and to eliminate unnecessary costs. *See* 42 U.S.C. § 1396a(a)(26); 42 CFR § 456 *et seq.* Utilization review requires SNF and HRF nursing homes to establish URCs of two or more physicians and other appropriate personnel not directly responsible for the care of the patients being reviewed. The URCs periodically review Medicaid-funded patients to determine if they need the level of care they are receiving or if a different level of care is more suitable. *See* 42 U.S.C. §§ 1395x(k), 1396a(a)(28) and 1396b(i)(4); 42 CFR §§ 456.305, 456.306, 456.331, 456.332, 456.334, 456.406 and 456.433; 10 NYCRR §§ 85.14-85.17, 416.9 and 421.13. Notice and opportunity for an administrative fair hearing are required if a URC determines that a patient should be transferred to a lower level of care. 42 U.S.C. § 1396a(a)(3); 42 CFR §§ 431.201, 431.210, 431.220 and 456.337-456.437; 18 NYCRR § 358.4(a).

*** PPHAs are privately owned and operated non-medical facilities regulated by the Department of Social Services. See NYSSL § 2(26); 18 NYCRR Parts 485-491. Publicly assisted PPHA residents receive federal and state Supplemental Security Income ("SSI") or Home Relief. *See* 42 U.S.C. § 1381 *et seq.;* NYSSL §§ 157, 158 and 209. Both SSI and Home Relief are paid directly to the recipient. 42 U.S.C. § 1382c; NYSSL §§ 131 (10) and 159. The recipient then pays the PPHA the amount required by his individual contract. Although PPHA residents may be Medicaid eligible, no PPHA receives Medicaid funds because it is not a provider of medical services.

ducted.* No respondent, intervenor-respondent or identified class member was transferred to, or recommended for transfer to, a higher level of care in the course of the proceedings, and no transfer to a lower level of care, other than the URC determinations noted above, was made, or recommended for, any such individual.

Respondents Yaretsky and Cuevas commenced the action on July 28, 1976, against the then Acting Commissioner of the Department Social Services and J. Raymond Diehl, Acting Deputy Commissioner of that agency.** Their complaint alleged violations of the Fourteenth Amendment, Title XIX of the Social Security Act (42 U.S.C. § 1396 *et seq.*) and its implementing regulations. More specifically, respondents challenged the composition of URCs, the URCs' methods in evaluating their needs, the adequacy of the Social Services Commissioner's review of URC determinations, the merits of the URC and Commissioner determinations approving lower levels of care for them and the alleged failure of Social Services personnel to advise them of their rights to, and at, fair hearings to review their URC determinations. Declaratory and injunctive relief was sought. Federal jurisdiction was alleged under 28

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* Neither of the individual respondents was in fact transferred pursuant to the URC determinations, and the transfers of the intervenors-respondents were enjoined by the district court. According to information provided by the American Nursing Home in April, 1981, respondent Yaretsky remained in his SNF for approximately one and one-half years after the Commissioner's March, 1976, decision affirming the URC determination that he be transferred to an IIRF. He was later transferred to Bellevue Hospital, and it is believed that he died sometime before January 10, 1978. Respondent Cuevas is still a patient in the same SNF from which he was to be transferred in 1976. Intervenor-respondent Rossoff was transferred from an IIRF to a PPHA with her consent.

** Philip Toia, the original Social Services defendant, became Commissioner on May 10, 1976, and remained in that office until August 3, 1977, when he was succeeded by Carmen Shang. Mr. Shang was succeeded by Barbara Blum, the present Commissioner, on December 1, 1977.

U.S.C. §§ 1331, 1343(3) and 1343(4).*

Temporary restraining orders were granted in December, 1977, prohibiting the transfers of the intervenors-respondents. See discussion, p. 4, first footnote. In an unreported decision and order filed on January 10, 1978, the district court partially resolved the claims alleged in the complaints by preliminarily enjoining petitioners to provide adequate notice of URC determinations on transfers to lower levels of care, resulting in reduced Medicaid benefits, and to permit patients subject to such transfers access to their complete medical records at their nursing homes. The preliminary injunction was affirmed by the Court of Appeals on January 16, 1979. 592 F.2d 65.**

In their March 6, 1979 joint pretrial order, the parties agreed that since July, 1978, the petitioners had considered all URC determinations recommending transfers to higher levels of care to be advisory and without prejudice to the patient's right to remain at a lower level of care with his

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* Respondents' amended complaint, dated April 7, 1977, and intervenors-respondents' complaint, filed in December, 1977, repeat the claims alleged in the original complaint. The amended complaint adds a claim that petitioners' failure to require each licensed nursing home to provide multiple levels of care violates 42 U.S.C. § 1396a(a)(19), a claim for damages and class action allegations. Robert A. Whalen, M.D., then Acting Commissioner of Health, was joined as a defendant (see *Parties in the Court Below, p. ii*), and J. Raymond Diehl was dropped.

** The parties entered into a partial consent judgment in May, 1979 (filed as a partial final judgment of the court by order of October 17, 1979), before the preliminary injunction was made permanent. Opinion below, App. B, p. 7a. The partial consent judgment embodied certain procedural safeguards for URC transfers to lower levels of care, including patient consent. *Ibid.* It reserved certain claims for future litigation, including the private physician and nursing home transfers to different levels of care and URC-recommended transfers to higher levels of care now in issue. *Ibid.* It also reserved the claims about the adequacy of URC evaluations and petitioner Blum's review of those evaluations as well as the alleged requirement that all licensed nursing homes provide multiple levels of care. See discussion, p. 4 and first footnote above. The claim for damages was neither settled nor reserved.

full Medicaid benefits in tact.* They also agreed that Medicaid patients recommended for transfer to another level of care by their private physician or nursing home could obtain URC review and the administrative fair hearing rights that attend such review.** This agreement, when read with the parties partial consent judgment, permits a Medicaid patient to veto a physician or nursing home transfer to a lower level of care in a different 'facility without prejudice to his right to remain at a higher level of care with full Medicaid benefits intact.***

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* The joint pre-trial order states as follows at ¶ 56 of the stipulated facts:

> "Since approximately July, 1978, it is defendant's [petitioners'] policy that URC determinations which recommend a higher level of care are advisory opinions and not mandatory determinations. Medicaid payments will not be terminated if a patient refuses to comply with a URC recommendation that a higher level of care is needed."

** The joint pre-trial order states as follows at ¶ 60 of the stipulated facts:

> "It is defendant's [petitioners,] policy that patients recommended for transfer to another level of care by the facility, its agents, or the patients' attending physician, do not have a right to prior notice and hearing to review such determination, although the patient may request that the decision be reviewed by the URC and upon such review [is entitled to the same procedural rights, i.e. notice and opportunity for an administrative fair hearing, that attend URC recommendations for lower levels of care.] Defendants [petitioners] are presently reviewing this policy and may stop such reviews."

Petitioners in fact continued the policy and have not advised the court or the respondents and intervernors-respondents to the contrary at any time during the proceedings.

*** The partial consent judgment states as follows at ¶ II(F)(2):

> "No finding, determination or other decision . . . by a Utilization Review committee . . ., can be approved or implemented:
>
> • • •

(footnote continued on following page)

The transfers of Medicaid patients to different levels of care by their physician or nursing home, or to higher levels of care on the advice of URCs, in issue on this petition, were first raised in the partial consent judgment and reserved for future litigation. App. B, p. 7a and discussion p. 5, second footnote.

Although, as just established, physician and nursing home transfers to lower levels of care and URC-recommended transfers to higher levels of care were voluntary under the terms of the partial consent judgment and the joint pre-trial order, the district court endorsement awards summary judgment to respondents and intervenors-respondents, finding that all the transfers in issue require due process hearings because state action is involved. App. D, p. 22a.* A (second) partial final judgment conforming

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(*footnote continued from preceding page*)

"If it is medically contraindicated:

* * *

"an adverse UR finding resulting in an out-of-facility transfer shall be deemed medically contraindicated unless the patient has voluntarily (i.e. knowingly, willingly and with knowledge of alternatives) consented to the transfer; provided that transfer within a geographic and operational entity providing both skilled nursing and health related care and services is not an out-of-facility transfer."

Since a Medicaid patient recommended for a different level of care by his physician or nursing home has the same procedural rights as a Medicaid patient recommended for a lower level of care by a URC (pre-trial order ¶ 60 set forth at p. 6, first footnote) the physician- or nursing home-referred patient obtains the right trial consent judgment quoted just abve.

* Summary judgment was also awarded on an aspect of the reserved claim about the adequacy of petitioner Blum's review of URC determinations. The petitioner, or her designee, was required to read verbatim transcripts of administrative fair hearings before affirming URC determinations adverse to patients. App. C. p. 20; App. D, p. 22a.

with the endorsement was issued on December 13, 1979. App. C, pp. 19a-21a. It decrees, *inter alia*, that petitioners' failure to provide prior written notice and prior opportunity to be heard at evidentiary hearings with respect to the transfers in issue deprived the Medicaid patient class of due process of law, and it enjoins petitioners to provide the appropriate notice and hearings. App. C, p. 20a-21a.*

The Court of Appeals modified and then affirmed the district court injunction on the transfer issues, holding that Medicaid patients in nursing homes are constitutionally entitled to due process hearings prior to URC-recommended transfers to higher levels of care and prior to physician and nursing home transfers from one level of care to another. App. B, p. 7a.** According to the opinion, the transfers are within the Fourteenth Amendment because they involve state action affecting protected interests in liberty or property. *Id.*, at pp. 7a-8a. The medical choices of physicians, nursing homes and URCs are viewed as state-delegated decisions to increase or reduce Medicaid benefits and thus "fairly treated as . . . [acts] of the State itself." *Jackson v.*

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* The class defined in the same partial final judgment is "all Medicaid recipients in the State of New York who are residents of skilled nursing facilities or health-related facilities in the State." App. C, pp. 19a- 20a.

** The Court of Appeals modified the injunction on the transfer issues to permit it to be vacated if HEW (now HHS) determined that the procedures there mandated made New York wholly or partially ineligible for federal Medicaid reimbursement. *Id.*, at p. 15a. It also reversed and vacated the district court injunction requiring petitioner Blum to read the verbatim transcripts of fair hearings before finding adversely to patients recommended for transfer. *Id.*, at pp. 11a-18a. The petition for certiorari of respondents and intervenors-respondents on the transcript issue was denied by this Court on Februay 23, 1981. — U.S. —, 67 L. Ed. 355.

Metropolitan Edison Co., 419 U.S. 345, 351 (1974). *Id.*, at p. 7a. A physician or nursing home transfer of a patient to a lower level of care, i.e. from an SNF to an HRF, or a patient's discharge, is held to deprive him of a constitutionally protected property right because of the consequential reduction, or elimination, of the Medicaid benefits paid on his behalf. *Id.*, at 9a. A patient's transfer to higher level of care, whether by his physician or nursing home, or URC-recommended, is identified with the transfer of a state prisoner to a mental institution considered in *Vitek* v. *Jones*, 445 U.S. 480, 488-91 (1980) (*Id.*, at p. 10a) and held to deprive the nursing home patient of a constitutionally protected liberty interest because of the effects of transfer trauma. *Id.*, at pp. 9a-10a. This Court's decision in *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), holding that the potential for transfer trauma is not a protected liberty interest, is distinguished on the two grounds. First, injury to the patients in this case is said to be more direct than in *O'Bannon* although patient transfers in both cases were occasioned by third parties, i.e. nursing homes or related personnel, and no difference in impact is noted (*Ibid.*). Second, the record in this case is said to include more information supporting the existence of transfer trauma than the *O'Bannon* record although the district court did not hold a hearing on this issue, and no affidavits on point were received. *Id.*, at p. 10a. The Court of Appeals did not consider the effect of petitioners' policies which permit patients recommended for higher levels of care by URCs and certain patients recommended for lower levels of care by their physicians or nursing homes to choose the level of care they prefer without prejudice to the continuance of full Medicaid benefits. See discussion, pp. 5-7. The Court also did not consider whether any named respondent, intervenor-respondent or identified class member had been, or imminently would be, subject to a URC-recommended transfer to a higher level of care

or a physician or nursing home transfer to a different level of care. Nor did the Court consider the fact that none of these possibilities was alleged in any of the complaints.

Reasons for Granting the Writ

The Court of Appeals opinion conflicts with prior decisions of this Court defining the limits of state action under the Fourteenth Amendment, including *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), upon which it relies. In no case has the Court permitted the decisions of private parties, like the medical decisions here in issue, to be treated as state action merely because the state permits the decisions to be made, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S., at 349, 350-51, or provides a conforming response, as in the increase or decrease of Medicaid benefits to accommodate the privately determined changes in medical treatment in issue. *See Coolidge* v. *New Hampshire*, 403 U.S. 443, 484-90 (1971); *Burdeau* v. *McDowell*, 256 U.S. 456 (1921). Transfer trauma, the basis for the Court of Appeals finding a protected liberty interest in Medicaid patient transfers to higher levels of care, was rejected as unworthy of constitutional protection last Term in *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980). The property right of constitutional dimension the Court of Appeals found present in transfers to lower levels of care again mistakes private action for state action and finds a claim of entitlement to constitutional protection where none is justified. *O'Bannon* v. *Town Court Nursing Center*, 447 U.S., at 785-88; id., at 795-802 (BLACKMUN, J. concurring). The Court of Appeals reached its conclusions although no named respondent, intervenor-respondent or identified class member alleged that he had been, or imminently would be, subject to any of the transfers it considered and in face of the fact that certain transfers to higher and lower levels of care were voluntary.

A. There was no case or controversy on any of the transfer issues decided below.

No plaintiff can meet the case or controversy requirement of Article III unless he demonstrates to the district court that he has suffered some actual or threatened injury as a result of the action challenged. *Gladstone Realtors* v. *Village of Bellwood,* 441 U.S. 91, 99 (1979); *O'Shea* v. *Littleton,* 414 U.S. 448, 493-94 (1974). Insofar as relevant to this petition, respondents and intervenors-respondents, by motion, challenged URC-recommended transfers of Medicaid patients to higher levels of nursing home care and physician and nursing home transfers of such patients from one level of care to another, including the patients' release to non-medical facilities and their discharge, on the ground that the failure to provide evidentiary administrative hearings violated the patients' rights to due process of law. Both the district court (App. D, p. 22a) and the Court of Appeals (App. B, pp. 7a, 9a) decided the issues in their favor. However, no respondent, intervenor-respondent or identified class member alleged that he had been subject to any of the challenged transfers.* None even attempted to show that he was threatened with a challenged transfer, let alone demonstrate that the threat was "real and immediate". See *O'Shea* v. *Littleton,* 414 U.S., at 496-97; *Golden* v. *Zwickler,* 394 U.S. 103, 109-110 (1969).**

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* The allegations in the complaints of respondents and intervenors-respondents were limited to URC transfers to lower levels of care. See discussion, pp. 2-5. They were settled in a partial consent judgment after the Court of Appeals' first decision in this case. See discussion p. 5, second footnote. No Medicaid patients who were URC-recommended for higher levels of care or transferred to different levels of care by their physicians or nursing homes were added, or identified, during any of the proceedings below.

** Notably, no Medicaid patient in a nursing home could have been "threatened" by a URC-recommended transfer to a higher level of care or by a physician or nursing home transfer to a lower level of care in a different facility when the district court issued the endorsement (App. D, p. 22a) and partial final judgment (App. C, pp. 19a-21a) considered below. All URC-recommended

(footnote continued on following page)

The district court's certification of a class of "all Medicaid recipients in the State . . . who are residents of skilled nursing facilities or health-related facilities" (App. C, pp. 19a-20a) did not alter the obligation to satisfy the case or controversy requirement with respect to the specific transfer issues raised in this petition. The named class representatives were required to "'allege and show that they personally have been injured, not that injury has been suffered by other unidentified members of the class to which they belong.'" *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 40 n. 20 (1976), quoting *Warth* v. *Seldon,* 422 U.S. 490, 502 (1975). Respondents and intervenors-respondents did not make the relevant showing.

The challenged URC-recommended transfers to higher levels of care and the physician and nursing home transfers to lower levels of care in different facilities did not satisfy the case or controversy requirement for the additional reasons that URC transfers had been voluntary since July, 1978, and physician and nursing home transfers, voluntary since May, 1979. See discussion, pp. 5-7, 11, second footnote. Thus, the presumed predicate for considering the due process claim against these transfers, an involuntary change in the level of care afforded a Medicaid patient affected through state action, was not present, and the relevant rulings below refer to a hypothetical case.

B. The decision of a private physician or other private party to change the level of care of a Medicaid patient in a nursing home or to discharge the patient does not involve state action.

In New York, a change in a nursing home patient's level of care is a medical decision between the patient and his

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(footnote continued from preceding page)

transfers to higher levels of care have been voluntary since at least July, 1978 (see discussion, pp. 5-6), and all physician and nursing home transfers to lower levels of care in different facilities have been voluntary since May, 1979 (discussion, pp. 6-7).

physician or other private health care professional.* The decision is the same for all patients regardless of whether their bills are paid privately or by Medicaid. In contrast to the palpably erroneous finding below (App. B, p. 8a), a confidential medical judgment for privately financed patients does not become a delegated state decision for Medicaid patients because public assistance benefits are subsequently increased or decreased. Indeed, once the Court of Appeals acknowledged that the adjustments in Medicaid benefits upon which it relied were determined by, and responded to, prior private medical decisions about the levels of care eligible patients should receive (App. B, p. 8a), a ruling in petitioners' favor on the state action issue was required. As prior decisions of this Court establish, a state or public response to private action does not transform the private action into state action. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 484-90 (1971); *Burdeau* v. *McDowell*, 256 U.S. 465 (1921).**

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* According to the opinions of the Court of Appeals in this case, a URC is a "private party" when it recommmends transfers to lower or higher levels of care. 592 F2d 65, 67 n.3 (2d Cir. 1979) (higher to lower levels of care); opinion below, App. B, p. 8a (lower to higher levels of care). As noted, URC determinations on both types of transfers are advisory and subject to patient veto. See discussion, pp. 5-6.

** The opposing view of the Court of Appeals gives Medicaid patients potential Fourteenth Amendment claims against their private physicians or health care professionals which are not available to privately financed patients. The potential claims involve any change in treatment that results in an adjustment of benefits. Examples of Medicaid decisions encompassed by the Court's theory are a doctor's prescription of a different, and coincidently less expensive drug, for a chronicly ill patient; the transfer of a patient from a semi-private hospital room to the intensive care unit; and the discharge of a patient from a hospital or nursing home as recovered. In addition, the Court's theory leaves all medical decisions that do not result in increased or deceased cost, e.g. a patient transfer from between SNFs that are paid the same Medicaid rate, outside the Fourteenth Amendment when they may have the same effect, e.g. transfer trauma, as the decisions the Court found within its protection.

Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), the only decision of this Court cited on the state action issue in the opinion below, is consistent with the principle just stated. *Jackson* also reaffirms the Court's consistent holdings that action by a private party is not considered state action unless it is compelled by the state acting as sovereign, *e.g. Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149, 164-66 (1978); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791 (1975); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 170 (1970); involves the exercise of a public function or the delegation of powers traditionally reserved to the state, *e.g. Flagg Brothers, Inc.* v. *Brooks*, 436 U.S., at 157-60; *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Nixon* v. *Condon*, 286 U.S. 73 (1932); or is performed by a private party with which the state is interdependent, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). No such circumstances are presented by the transfers of nursing home Medicaid patients here in issue.

New York does not compel private physicians, nursing homes or URCs to transfer patients to different levels of care. There is no regulation in this regard for private physicians. Nursing homes are prohibited from transferring their patients for reasons not here relevant and are permitted to transfer them for medical reasons. NYPHL Art. 28; 42 CFR § 405.1121(k)(4); 10 NYCRR § 414.14(a). See *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 780 n. 9 (1980).* Federally-mandated URCs periodically review Medicaid nursing home patients, requiring physician certifications that the patients need the level of care provided. *See* 42 CFR §§ 456.260 and 455.333 and discussion, p. 3, second footnote.** As appears, state law

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* As noted (pp. 6-7), New York permits a patient to veto a physician or nursing home transfer to a lower level of care in a different facility as a matter of policy.

** As noted (pp. 5-6), URC-recommended transfers to higher levels of care are advisory in New York and subject to patient veto, also as a matter of policy.

and policies simply allow the transfers in issue, an insufficient basis for treating the relevant medical decisions as state action. *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S., at 164-66; *Jackson* v. *Metropolitan Edison Co.*, 419 U.S., 349, 350-51.

Nor do the challenged transfers involve the delegation of a public function to, or the exercise of state powers by, a private party. As established, a private physician or nursing home transfer of a Medicaid patient to another level of care or a URC recommendation for a higher level of care is a private decision based on the patient's medical needs. The state then responds to the decision by adjusting Medicaid benefits to conform with the treatment choice of the patient and his health care professional. It does not delegate the adjustment of Medicaid benefits to the health care professional any more than it delegates the adjustment of AFDC benefits to a landlord who evicts a mother and her dependent children, requiring them to seek shelter in a hotel at increased cost and consequentially increased benefits. Plainly, the medical decisions at issue herein cannot be considered delegations of sovereign authority when the warehousemen's power to execute liens was not so considered in *Flagg Brothers*, 436 U.S., at 157-63. In addition, the Medicaid patients here, like the bailors in *Flagg Brothers*, have common law and statutory causes of action against their physicians and nursing homes (e.g. NYPHL § 2801-d) in which they can resolve questions about the appropriateness of their care directly.

Finally, the challenged transfers cannot be considered state action under the "interdependency" or "symbiotic relationship" test of *Burton* v. *Willimgton Parking Authority, supra.* The restaurant that practiced racial discrimination there held to be affected with state action was a lessee of the state parking authority which had "so far insinuated itself into a position of interdepen-

dence with the restaurant that it was a joint participant in the enterprise." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S., at 357-58. New York does not participate in the private medical decisions here in issue at all. It merely accommodates them.

C. A Medicaid patient in a nursing home is not deprived of a constiutionally protected interest in liberty or property when his private physician or nursing home transfers him from one level of care to another or when a Utilization Review Committee recommends his transfer to a higher level of care.

The Court of Appeals mistakenly reached two questions: whether a nursing home Medicaid patient has a constitutionally protected property right which is affected by a physician or nursing home transfer to a lower level of care in different facility (App. B, p. 9a); and whether the patient has a constitutionally protected liberty interest which is affected by a URC recommendation in favor of a higher level of care. *Id.*, at pp. 9a-10a. Both types of transfers were voluntary during the relevant proceedings before the district court and Court of Appeals.* As a result, they could not deprive a Medicaid patient of any interest, and there was no occasion to consider whether the particular interests involved were of a constitutional dimension. *Parham* v. *J. R.*, 442 U.S. 584, 622 (1979) (STEWART, J. concurring).

If the patient interests in all of the challenged transfers were properly reached, the Court of Appeals committed palpable error in finding that constitutionally protected interests in liberty and property were involved. App. B, pp.

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* Physician and nursing home transfers to lower levels of care in different facilities have been voluntary since May, 1979, i.e. subject to patient veto and without prejudice to the continuance of Medicaid benefits conforming with the level of care the patient choses. See discussion, pp. 6-7. URC recommendations in favor of higher levels of care have been advisory since July, 1978, and equally without prejudice to the patient's remaining at his preferrel level of care. See discussion pp. 5-6.

8a-10a. "This Court has never found that the involuntarily committed [to state mental institutions] have a constitutional right to treatment, much less the voluntarily committed. See *Sanchez* v. *New Mexico*, 396 U.S. 276 (1970), dismissing for want of a substantial federal question, . . .; *O'Connor* v. *Donaldson*, 422 U.S. 563, 587-89 (1975) (BURGER, C. J. concurring)." *Pennhurst State School* v. *Halderman*, —— U.S. ——, 49 U.S.L.W. 4363, 4367 n. 13 (April 20, 1981). *A fortiori*, Medicaid patients who voluntarily enter private nursing homes and who are attended by their own physicians have no constitutionally protected interest in the level of care they receive. Their rights in this regard are thus the same as, and not higher than, the rights of privately financed patients. See *O'Bannon* v. *Town Court Nursing Center*, 447 U.S., at 787.

Analyzing the Medicaid patient's alleged liberty and property interests separately, as in the opinion below (App. B, pp. 8a-10a), does not produce a different result. The Court of Appeals found a protected liberty interest for physicians and nursing home transfers to higher levels of care and URC recommendations for such care. For this purpose, it relied on a speculative condition called "transfer trauma" (*Id.*, at pp. 9a-10), previously rejected as the basis for a liberty interest of constittuional dimension in *O'Bannon* v. *Town Court Nursing Center*, 447 U.S., at 784; id., at 802-804 (BLACKMUN, J. concurring). Although the Court of Appeals found that the impact of the transfers in this case was more direct than in *O'Bannon*, it did not state any basis for its conclusion (App. B, pp. 9a-10a), and none is discernible. See *O'Bannon* v. *Town Court Nursing Center*, 447 U.S., at 793 (BLACKMUN, J., concurring). The Court of Appeals alternative reliance on the allegedly "ample" record supporting the existing of transfer trauma in this case, and not available in *O'Bannon*, is also misplaced. This Court assumed transfer trauma existed for purposes of its *O'Bannon* decision. 447 U.S., at 784 p. 16. Thus, the Court of Appeals could not

rely on an allegedly better record supporting the same proposition to reach a different result. In fact, the record in this case is not more ample than the record in *O'Bannon*. There was no evidentary hearing before the district court on the question, and no affidavits on point were received. See 447 U.S., at 784 n. 16, similarly characterizing the *O'Bannon* record.

The Court of Appeals found a protected property interest in physician and nursing home transfers to lower levels of care, including the discharge of a patient, or his release to a non-medical adult home, or PPHA. App. B, p. 9a. For this purpose, it relied on the fact that the patient's " 'essentially financial' " " 'direct benefits' " are reduced or withdrawn to conform with the change in his treatment program. App. B, p. 9a, quoting *O'Bannon* v. *Town Court Nursing Home Center*, 447 U.S., at 786-87. The ruling disregards the fact that the determinative decision is the private, medical decision of the patient and his health care professional and misapplies the property right analysis presented in *O'Bannon*. In contrast to the situation in which the state denies public assistance directly, i.e. on the basis of its own investigation and finding of ineligibility or other disqualifying condition (see *O'Bannon* v. *Town Court Nursing Center*, 447 U.S., at 786-87), the state does not make the determinative medical decisions here in issue, and the Medicaid patient does not obtain any actionable claim based on state deprivation of property or any other Fourteenth Amendment interest. See discussion, Subpoint B.

Even if private physician and nursing home transfers from higher to lower levels of care are viewed as state imposed restrictions on Medicaid benefits, the patients' 'property interest' thus derived would not be constitutionally protected. "The Court never has held that *any* substantive restriction upon the removal of *any* governmental benefit gives rise to a generalized [protected]

property interest in its continued enjoyment." *O'Bannon* v. *Town Court Nursing Center,* 447 U.S., at 795 (BLACKMUN, J. concurring (emphasis original). The nature of the interest at issue in each case must be examined (Id., at 796, citing *Board of Regents* v. *Roth,* 408 U.S. 564, 577 [1972]), and any claim of entitlement to constitutional protection must depend on expectations that are "'justifiable,' *Vitek* v. *Jones,* 445 U.S., at 489; 'protectible,' *Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1, 7 (1979); 'sufficient,' *Bishop* v. *Wood,* 426 U.S. 341, 344 (1976); or 'proper,' *id.,* at 362 (dissenting opinion)." *Ibid.* The Medicaid patient's only fair expectation when he enters a nursing home is that his level of care will increase or decrease as his condition warrants and that he will be dischaged, or released to a non-medical facility, when he is sufficiently recovered. As appears, this expectation, like that of a privately financed patient, conforms exactly with the purpose and effect of the medical decisions to which he is subject, and no 'justifiable,' 'sufficient' or 'proper' claim of entitlement to due process protection can be invoked against them. See *O'Bannon* v. *Town Court Nursing Center,* 447 U.S., at 796-802 (BLACKMUN, J. concurring), finding no property interest worthy of due process protection in transfers of Medicaid nursing home patients resulting from governmental decertification of the home in which they were patients.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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